NO. 48531-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

L.M. a minor, by and through his Guardian ad litem,
WILLIAM L. E. DUSSAULT,

Appellant,

v.

LAURA HAMILTON, individually and her martial community;
LAURA HAMILTON LICENSED MIDWIFE, a Washington
business,

Respondents.

BRIEF OF RESPONDENTS HAMILTON

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I. INTRODUCTION

L.M., a minor, through his guardian ad litem, sued a licensed midwife, Laura Hamilton, claiming that she was negligent in the management of his delivery, causing him to sustain a permanent rupture or avulsion injury to his right brachial plexus. Midwife Hamilton denied his claims.

L.M.'s theory of the case was that Midwife Hamilton encountered a shoulder dystocia during the delivery, applied excessive lateral traction to L.M.'s head and neck to free the shoulder, and thereby caused his brachial plexus injury. Midwife Hamilton's theory of the case was that this was a normal birth with gentle handling of the baby to assist delivery, with no shoulder dystocia or excessive traction, and that L.M.'s brachial plexus injury was caused by natural forces of labor, not by anything she did. Both sides supported their positions with medical expert testimony based on their experts' knowledge, training, and experience, interpretation of medical literature, and review of L.M.'s birth video and medical records.

While L.M.'s experts claimed the birth video showed a shoulder dystocia with Midwife Hamilton using excessive traction to relieve it, the defense experts disagreed, finding that it showed proper handling of the baby, no shoulder dystocia, and no excessive traction. And while L.M.'s experts claimed that the medical literature did not support a conclusion that natural forces of labor could cause a rupture or avulsion of the

brachial plexus nerve roots like L.M. had and that such an injury must have occurred as a result of the use of excessive lateral traction, the defense experts disagreed. They explained that there was ample medical literature establishing that permanent brachial plexus injuries (which include rupture or avulsion injuries) can and do occur from natural forces of labor without any intervention by the birth attendant and that, more probably than not, that is what occurred in L.M.'s case where the birth video shows proper handling of the baby and no excessive traction.

The jury returned a verdict for Midwife Hamilton, finding no negligence. On appeal, L.M. asserts error in (1) allowing defense medical expert testimony that L.M.'s injury was caused by natural forces of labor; (2) allowing Allan Tencer, Ph.D., a biomechanical engineer, to testify as to the endogenous and exogenous forces of labor; (3) granting Midwife Hamilton's motion to change venue; and (4) excluding certain testimony from L.M.'s plastic surgeon, Dr. Tse, concerning causation. Because the trial court did not err or abuse its discretion with respect to the complained-of rulings, the judgment on the jury's verdict should be affirmed.

II. COUNTERSTATEMENT OF ISSUES PRESENTED

(1) Did the trial court properly admit expert testimony concerning natural forces of labor as a cause of L.M.'s brachial plexus injury?

(2) Did the trial court properly exercise its discretion in allow-

ing Dr. Tencer to testify about the biomechanical forces involved in labor and delivery, but not as to causation of L.M.'s injury?

(3) Should this Court reject L.M.'s claim of error regarding the order changing venue, where L.M. did not seek discretionary review of it, L.M. has not demonstrated any prejudice resulting from it, and the court properly exercised its discretion in granting the change of venue?

(4) Did the trial court properly exercise its discretion in excluding an excerpt from the deposition of Dr. Tse, L.M.'s plastic surgeon, concerning causation of brachial plexus injuries, given the limitations Dr. Tse placed on his ability to so testify and the cumulative nature of the proffered testimony?

III. COUNTERSTATEMENT OF THE CASE

A. L.M.'s Delivery and Brachial Plexus Injury.

Laura Hamilton, a licensed midwife, has delivered 3500 babies over her 32-year career. 10/23 RP (Hamilton) 5, 11. After Kelly Myhre, L.M.'s birth mother, became pregnant with L.M., her first pregnancy, she chose to see Midwife Hamilton. *See* 10/20 RP (Openings) 5:3-8; 10/23 RP (Hamilton) 54:12-16; Ex. 2, pp. 2, 14. Her pregnancy proceeded uneventfully. Ex. 2, p. 2. About 5:30 p.m. on April 4, 2010, she was having contractions every 5 minutes. *Id.* at p. 6. About 8:45 p.m., she arrived at Hamilton's clinic in active labor. *Id.* Her membranes ruptured ten

minutes later. *Id.* By 10:30 p.m., her contractions intensified and she felt the urge to push. *Id.* By 11:35 p.m., her cervix was completely dilated, she was moved to bed and began pushing, and L.M. was delivered seven minutes later.[1] *Id.* Her husband, mother and friend were there, *see* Ex. 2, p. 9; 10/20 RP (Openings) 11-13, and her mother videotaped the birth on a cell phone,[2] 10/29 RP (Closings) 6:22-23; *see* Ex. 1.

During the delivery, once L.M.'s head was out, Midwife Hamilton observed a nuchal cord[3] and reduced it over L.M.'s head. 10/23 RP (Hamilton) 27:20-28:1, 67:3-13; Ex. 2 at pp. 7, 9. Then L.M. turned, rotated himself, and freed his shoulders, and Midwife Hamilton assisted him out. 10/23 RP (Hamilton) 27:7-28:1; 10/28 RP (Hamilton) 10:1-25. With back stimulation and blow-by oxygen, L.M. pinked up, was crying and was placed on his mother's abdomen. 10/23 RP (Hamilton) 52:3-7; Ex. 2, pp. 7, 9. Thereafter, it was noted that L.M.'s right arm was weak. 10/23 RP (Hamilton) 52:8-24; Ex. 2 at pp. 7, 9. Unfortunately, his right arm function did not improve over time, *see* 10/22 RP (Glass) 26:21-27:1,

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[1] The time from the cervix being completely dilated and delivery of the infant is the second stage of labor. In a first-time mother the second stage usually lasts from one to three hours. Ms. Myhre's lasted only seven minutes and thus was incredibly fast. 10/26 RP (Browder) 26:9-28:14; *see also* 10/21 RP (Mandel) 12:12-14, 40:14-15. A quick second stage with rapid descent of the infant has been shown to have a higher incidence of brachial plexus injuries. 10/28 RP (DeMott) 16:15-17:4.

[2] Sandy Morris, Midwife Hamilton's neighbor, was also present as an assistant. 10/23 RP 54:24-55:9; 10/28 RP 6-12; *see* Ex. 2 at p.9.

[3] A nuchal cord is where the umbilical cord gets wrapped around the baby's neck in utero. *See* 10/22 RP (Glass) 17:18-19. There was no dispute that Midwife Hamilton properly managed the nuchal cord. *See* 10/21 RP (Mandel) 19:2-6.

and L.M. ultimately underwent surgery which revealed a rupture, partial avulsion, or avulsion of all five nerve roots of the brachial plexus.[4] 10/22 RP (Glass) 33:7-11. Despite efforts to reattach the nerve roots, L.M. still has limited use of his right arm. 10/22 RP (Glass) 39:23-40:25.

According to Midwife Hamilton, there was no shoulder dystocia,[5] L.M. did not have a stuck shoulder, she did not use excessive traction,[6] pulling, or twisting to his head or neck, and she did not rotate L.M., rather he rotated himself. 10/23 RP (Hamilton) 4:24-5:1, 15:25-16:5, 26:9-10, 27:3-29:10, 31:17-22, 32:5-15, 49:11-50:5, 68:12-17, 80:5-14; 10/26 RP (Hamilton) 6:16-25; 10/28 RP (Hamilton) 8:17-11:4 (describing L.M.'s birth video, Ex. 1, from delivery of the head to delivery of the body), 14:15-15:24, 16:11-16, 17:18-20. She just had her hands on him, waiting for his signals, and assisted in guiding him out. 10/23 RP (Hamilton) 27:7-29:10; 10/28 RP (Hamilton) 10:1-21.

B. L.M.'s Filing of His Lawsuit in King County and the Transfer of Venue to Lewis County.

L.M., through his guardian ad litem, William Dussault, sued

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[4] The brachial plexus is a complex of nerves that come out of the spinal cord, innervates the arm, sits right under the clavicle, and is uniquely susceptible to injury because of its adjacency to the shoulder joint. 10/21 RP (Mandel) 60:6-17; 10/22 RP (Glass) 12:14-14:2; *see also* CP 1952.

[5] Shoulder dystocia occurs when the baby's head delivers, its anterior shoulder clearly locks up behind the mother's symphysis pubis, and normal birth maneuvers, such as normal gentle lateral traction, do not release it. 10/28 RP (DeMott) 30:14-20, 85:8-86:6.

[6] It is appropriate and normal for the birth attendant to use gentle guidance and lateral traction to guide the baby and its shoulders out. 10/26 RP (Browder) 48:14-18; 10/28 RP (DeMott) 30:14-20; *see also* 10/20 RP (Kelly) 29:11-23, 30:21-31:3.

Midwife Hamilton, her business entity, and Joint Underwriters Association of Washington State (JUA), the statutorily created program that provides medical malpractice insurance coverage to birthing centers, nurse midwives, and licensed midwives such as Midwife Hamilton, *see* CP 638; RCW Ch. 48.87; WAC Ch. 284-87, in King County Superior Court on January 27, 2014, claiming that that Midwife Hamilton negligently managed his delivery and that JUA negligently failed to assess whether Midwife Hamilton was an acceptable insurable risk. CP 1453-58. On March 6, 2014, L.M. amended his complaint to add the same claim of negligence against Midwifery Support Services, LLC (MSS), JUA's administrative service company, *see* CP 638, that he made against JUA. CP 1395-1401. The defendants denied L.M.'s claims. *See* CP 1217-23, 1229-35.

While JUA and MSS were still parties to the lawsuit, Midwife Hamilton, on March 10, 2014, moved to change venue to Lewis County as L.M.'s delivery occurred there, Midwife Hamilton, L.M., his adoptive parents, his birth mother, and fact witnesses central to the lawsuit were located there, and L.M.'s improper assertion of a fictitious tort claims against JUA and MSS did not justify L.M.'s attempt to establish venue in King County. CP 1369-78; *see* CP 1307-11. JUA and MSS joined in the motion, CP 1297-98, L.M. opposed it, CP 1344-52, and then King County Superior Court Judge Mary Yu denied it. CP 1293-94.

Thereafter, JUA and MSS moved for summary judgment, CP 635-71; *see also* CP 58-64, which L.M. opposed, CP 468-91; *see also* CP 198-99, but King County Superior Court Judge Ken Schubert granted, dismissing L.M.'s claims against JUA and MSS. CP 25-30. Midwife Hamilton then moved again to change venue. CP 32-40; *see also* CP 9-10.

In response, CP 17-22, L.M. claimed "King County was a far more convenient forum for the parties and witnesses," listing the names of numerous providers who treated L.M. for his arm injury at Seattle Children's Hospital, and noting that the experts were likely to come from other states or Seattle and that L.M.'s guardian ad litem and the parties' counsel were from King County. CP 19:6-20:17. He asserted that ***"[i]f Hamilton is open to venue in King County***, the motion to change [venue] to Lewis County should be denied." CP 21:6-7 (emphasis added). L.M speculated that he might not be able to have an impartial jury in Lewis County, claiming there was "a greater chance of a biased jury composed of people who have used Hamilton's services or are related to or acquainted with someone who has." CP 20:26-21:1. L.M told the court that, "[u]nder RCW 4.12.025, Hamilton can call for this action to be tried in the county of her residence," and that "[w]hile '[t]he initial choice of venue belongs to the plaintiff', ... ***if the defendant objects to venue that is not proper as to her, 'the case must be transferred to a court with proper venue,***'" but

claimed that it was not "entirely clear" whether Midwife Hamilton objected to venue in King County, CP 21:9-15 (emphasis added).

In reply, Midwife Hamilton made clear that she did object to venue in King County and pointed out how unlikely it was that L.M. would call all of his providers from Seattle Children's to testify at trial. CP 9-10.

Based on findings that Midwife Hamilton resides and practices, that L.M. was born and resides, and that all events related to the lawsuit occurred in Lewis County, Judge Schubert transferred the case there. CP 5-7. L.M. did not seek discretionary review of the order changing venue, but instead proceeded to jury trial from October 19 to 29, 2015, in Lewis County Superior Court before Judge James W. Lawler. *See* CP 3824-25.

C. The Parties' Respective Theories of the Case.

The main disputes at trial were (1) whether Midwife Hamilton properly managed L.M.'s delivery or used excessive traction or twisted L.M.'s head and neck; and (2) whether L.M.'s injury was caused by natural forces of labor or by use of improper traction or twisting.

1. L.M.'s theory of the case and expert testimony.

At trial, L.M. presented expert medical testimony on standard of care and causation from an obstetrician, Dr. Howard Mandel, and a nurse midwife who does not do home births, Pamela Kelly, 10/20 RP (Kelly) 73:12-13, and on causation and damages from a child neurologist, Dr.

Stephen Glass. Their testimony was based on their review of L.M.'s birth video and medical records, *see* 10/20 RP (Kelly) 18:11-21; 10/21 RP (Mandel) 11:14-23; 10/22 RP (Glass) 14:22-25, 18:9-11, their interpretation of the medical literature, *see* 10/20 RP (Kelly) 75:1-11, 82:19-83:6; 10/21 RP (Mandel) 67: 5-6, 19-21, 68:5-8, 69:2-5, 90:20-91:5, 91:6-92:9, 112:13-113:17, 113:25-114:3; 114:4-115:11, 117:7-21, 118:7-22; 10/22 RP (Glass) 86:7-89:18, and their knowledge, training and experience.

Both Dr. Mandel and Midwife Kelly reviewed L.M's birth video, Ex. 1, with the jury and testified that it showed both a shoulder dystocia after L.M.'s head delivered and Midwife Hamilton applying excessive traction and twisting to L.M.'s head and neck during the next 60-70 seconds before the rest of his body was delivered.[7] *See* 10/20 RP (Kelly) 38:12-39:14, 40:24-41:6, 44:17-19, 57:19-23; 10/21 RP (Mandel) 11:3-13, 21:5-22:19, 25:18-20, 45:2-11, 46:13-47:3, 47:21-24, 48:16-49:2, 70:3-5. They also testified that Midwife Hamilton violated the standard of care by failing to use proper procedures to relieve what they believed was a

[7] Although he would defer to the obstetricians to define shoulder dystocia, Dr. Glass believed from his review of the birth video that there was a shoulder dystocia, at least a delay in the delivery of L.M.'s shoulder, and that there was movement ("wiggling and rotating") of L.M's head and neck and McRoberts positioning (knees to ears) of the mother to try to free the shoulder. 10/22 RP (Glass) 18:9-19:25, 20:4-21. He quantified the time from delivery of the head to delivery of the body at about 70 seconds. *Id.* at 20:1-3. When asked whether Midwife Hamilton's handling ("turning and pulling") of L.M.'s head and neck exacerbated the shoulder dystocia and created the severity of the injury, Dr. Glass could only say that the maneuvers she utilized helped to define that there was a dystocia and that, as a child neurologist, he could not look at the video and say how much force she used. *Id.* at 110:21-111:10.

shoulder dystocia, and by using what they believed was excessive traction and twisting of L.M.'s head and neck. 10/20 RP (Kelly) 44:24-46:5, 69:14-16; 10/21 RP (Mandel) 11:3-13, 50:24-52:5.

Dr. Mandel and Midwife Kelly also testified that L.M.'s brachial plexus injury was caused by Midwife Hamilton using the excessive traction or twisting maneuvers they believed the birth video showed, *see* 10/20 RP (Kelly) 69:7-13; 10/21 RP (Mandel) 11:3-13, 66:22-25, 111:6-11; 125:18-22, while Dr. Glass, who could not determine from the video how much force was used, 10/22 RP (Glass) 110:21-111:10, opined only that, given the degree of injury to the brachial plexus, pulling, rather than natural forces of labor, was the most likely cause. 10/22 RP (Glass) 86:4-87:3. To bolster those opinions, L.M.'s experts also testified that there is nothing in the medical literature showing that an avulsion brachial plexus injury happened because of natural forces of labor. 10/21 RP (Mandel) 69:2-5, 112:13-113-17, 118:19-22; 10/22 RP (Glass) 86:22-24, 89:10-13, 108:14-18, 115:8-10; *see also* 10/20 RP (Kelly) 82:19-83:6.

L.M.'s experts, however, admitted that natural forces of labor can cause fractured clavicles, fractured tailbones, as well as some brachial plexus injuries. *See* 10/21 RP (Mandel) 88:2-25; 10/22 RP (Glass) 87:8-13, 89:4-5, 119:4-7, 104:23-25. They acknowledged that there are case reports of permanent brachial plexus injuries occurring in the absence of

shoulder dystocia, with C-sections, and in cases where the birth attendant is not even touching the patient. *See* 10/21 RP (Mandel) 87:17; 119:3-21; 10/22 RP (Glass) 13:18-19, 115:11-25. And, they admitted that there is no literature establishing that only traction, as opposed to natural forces of labor, can cause permanent avulsion or rupture brachial plexus injuries. 10/21 RP (Mandel) 90:20-91:5; 10/22 RP (Glass) 120:10-15.

Dr. Mandel, despite his interpretation of the 2014 American College of Obstetrics and Gynecology (ACOG) Report on "Neonatal Brachial Plexus Palsy," CP 1867-1987, as saying that natural forces of labor can cause transient brachial plexus stretch injuries that go away in a short period of time, 10/21 RP (Mandel) 114:4-115:11, ultimately acknowledged that the ACOG Report talks about both transient and permanent (or persistent) brachial plexus injuries being caused by forces of maternal contractions, and agreed that the report's reference to permanent (or persistent) injuries includes avulsions, ruptures, and bad stretch injuries, 10/21 RP (Mandel) 117:7-21, 118:7-11. And, as to whether natural forces of labor can produce the amount of force needed to cause multiple nerve avulsions and ruptures, Dr. Glass testified that "we simply lack the data to say that it can or it can't … [e]ither way." 10/22 RP (Glass) 120:10-15.

2. The defense theory of the case and expert testimony.

At trial, Midwife Hamilton presented expert medical testimony on

standard of care from a licensed midwife experienced in home births, Dolly Browder, *see* 10/26 RP (Browder) 5:10-11:19, on standard of care and causation from an obstetrician, Dr. David DeMott,[8] and on causation and damages from an adult and child neurologist, Dr. Thomas Collins. Their testimony (like that of L.M.'s experts) was based on review of L.M.'s birth video and medical records, *see* 10/26 RP (Browder) 30:21-31:4; 10/28 RP (DeMott) 37:8-17: CP ___ (Collins Dep. at 14:4-18, 21:3-8),[9] their interpretation of the medical literature, *see* 10/26 RP (Browder) 30:25-31:2; 10/28 RP (DeMott) 8:9-10, 8:19-9:10, 10:13-19:1, 20:12-21:9, 27:18-28:10, 28:23-29:25, 68:15-23, 95:2-14; CP___ (Collins Dep. at 17:7-21:24, 30:8-22), and their knowledge, training, and experience.

Both Dr. DeMott, who reviewed L.M.'s birth video with the jury, 10/28 RP (DeMott) 40:23-50:15, and Midwife Browder testified that the birth video showed a normal birth with Midwife Hamilton properly releasing a nuchal cord, using normal gentle traction to guide L.M. out during an exceedingly short second stage of labor, no shoulder dystocia, and no use of excessive traction or other inappropriate maneuvers, and L.M. himself

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[8] Unlike Dr. Mandel, L.M.'s obstetrical expert, Dr. DeMott has published on the cause of brachial plexus injuries (and has had his publications cited) in peer-reviewed medical literature. 10/28 RP 8:1-12, 10:10-11:10.

[9] Dr. Collins' testified via videotaped deposition. *See* CP 4843, 4845. His published deposition was included in a designation of clerk's papers filed on July 15, 2016, but the index has not yet been received. Therefore, the deposition is being cited as "CP __," with a parenthetical identifying the pages and lines of the deposition being cited.

rotating (corkscrewing) his shoulder out while Midwife Hamilton's hands were not on him. 10/28 RP (DeMott) 45:18-21, 47:15-22, 52:10-53:13, 72:4-73:4, 74:21-23, 84:14-20, 89:6, 91:5-11, 100:9-20; 10/26 RP (Browder) 31:3-33:16, 35:4-6, 48:3-8, 50:24-51:1, 70:2-5, 79:17-80:11, 83:2-7, 83:12-84:2. They testified that Midwife Hamilton complied with the applicable standard of care in the delivery, 10/28 RP (DeMott) 54:4-14, 54:21-25; 10/26 RP (Browder) 34:2-35:3, and that they did not see any inappropriate maneuvers by her that would be expected to cause injury. 10/26 RP (Browder) 35:4-6; *see* 10/28 RP (DeMott) 54:21-25, 55:4-6.

Dr. DeMott testified that Midwife Hamilton did not cause L.M.'s brachial plexus injury, 10/28 RP (DeMott) 55:4-6, but rather it was caused by the unfortunate vertical orientation of L.M.'s shoulders with a short second state of labor that led to a stretch injury of his brachial plexus as he was pushing and crowning, *id.* at 54:15-20.[10] Dr. DeMott testified that L.M.'s brachial plexus injury occurred in the first two minutes of pushing when his head was crowning, as the period of maximal brachial plexus

[10] Dr. Collins, who as a neurologist felt that he could not say whether any maneuvers by Midwife Hamilton played any role, testified that, in looking at the birth video, he did not see the kind of "traction and vigor" he has had the opportunity to see in other labors and deliveries in which there were brachial plexus injuries, and was of the opinion that L.M.'s injury occurred during the birthing process as L.M. was going through the birth canal. CP ___ (Collins Dep. at 19:14-21:18). He further testified that, assuming that Midwife Hamilton complied with the standard of care and did not use excessive traction, then more probably than not L.M.'s permanent brachial plexus injury was caused by L.M.'s going through the birth canal the way he did. *Id.* at 34:12-35:5. Dr. Collins, who is not an obstetrician or midwife, was the only one of the defense experts, who thought there was shoulder dystocia during L.M.'s delivery. *See id.* at 20:19.

stretch and most probable time stretching occurred was as the head crowned. *Id.* at 81:9-15. In his opinion, the injury occurred before Midwife Hamilton put her hands on L.M., and there was no evidence that anything she did added to the injury. *Id.* at 93:5-16.

Both Dr. DeMott and Dr. Collins testified that the medical literature establishes that natural forces of labor can and do cause permanent brachial plexus injuries.[11] 10/28 RP (DeMott) 28:23-29:15, 68:24-69:5; CP ___ (Collins Dep. at 30:8-14, 33:18-34:8). They disagreed with Drs. Mandel and Glass that brachial plexus avulsions can never occur without traction and pointed out that there was no literature (not a single case report) that says avulsions occur only with traction. 10/28 RP (DeMott) 68:15-23, 84:4-11; CP ___ (Collins Dep. at 30:15-22). As Dr. DeMott

[11] Dr. DeMott gave the jury a detailed analysis of the medical literature and how the thinking about the cause of brachial plexus injuries has evolved over the years. *See* 10/28 RP (DeMott) 11:11-21:9. He pointed out that there never was any real evidence supporting earlier thinking that brachial plexus injuries were due to the birth attendant pulling on the baby's head, *id.* at 11:13-19, 28:3-10, and the thinking has evolved since then, such that now the evidence suggests that most brachial plexus injuries are not caused by the birth attendant, but by natural forces of labor as the baby traverses through the mother's pelvis, *id.* at 11:20-12:4, 18:23-19:1. That evidence includes epidemiological evidence from the reports of brachial plexus injuries, including permanent ones, occurring in cases where there was no shoulder dystocia, in cases where the birth attendant applied no traction, and in cases where a C-section was done after the mother had been pushing without progression of the baby into the birth canal, as well as a study that showed no difference in incidence of brachial plexus injuries in the hands of more-experienced, as compared with less-experienced, birth attendants. *Id.* at 13:2-15:19. That evidence also included the reports of increased incidence of brachial plexus injuries with a rapid descent, a second stage of labor of less than 15-20 minutes, the fact that the incidence of brachial plexus injuries has not decreased even with use of the various maneuvers used to relieve shoulder dystocia, and the reports of cases involving permanent injury to the posterior arm. *Id.* at 15:20-18:11.

noted, there is no scientific data or literature supporting the notion that permanent brachial plexus injuries cannot be caused by the same mechanism as temporary ones, as they are all stretch injuries and, if the nerve stretches only some, the injury can heal and be temporary, but if it stretches more, it can break, avulse or rupture such that the injury is permanent.[12] 10/28 RP (DeMott) 27:18-28:2, 94:12-95:1. And as Dr. Collins explained, a persistent or permanent nerve injury necessarily means the nerve is ruptured or avulsed, as otherwise there would be nerve regeneration and return of function. CP ___ (Collins Dep at 29:14-30:7).

Midwife Hamilton also presented expert testimony from Allan Tencer, Ph.D., a biomechanical engineer, as to the endogenous and exogenous forces involved in labor and delivery. 10/27 RP (Tencer) 1-39. Based on his review of the studies that have been done to measure those forces, including those done by another biomechanical engineer, Michelle Grimm, who published the chapter on "Pathophysiology and Causation" in the 2014 ACOG Report, CP 2424-40, Dr. Tencer testified that the internal forces trying to push the baby out range from about 28 to 37 pounds, and the external forces from the birth attendants guiding or pulling the baby out range from 1.6 pounds up to 57 pounds, such that on average they are

[12] Dr. DeMott does not think the degree of force required for a temporary injury versus a permanent one is different, given the variability with which babies' nerves are more or less resistant to the same degree of force. 9/28 RP (DeMott) 95:15-24.

about the same. 10/27 RP (Tencer) 9:17-16:3, 31:13-25. He further testified about "contact forces," the compression and tension forces at play on the brachial plexus when a baby's shoulder comes up against a solid obstruction such as the mother's pelvis, and pointed out that the studies have shown not only that the compression forces are four-to-nine times greater than the tension forces, but that the nerves can withstand more tension than compression, as the studies have shown nerves can typically withstand a stretch of as much as 30 percent. *Id.* at 16:15-19:5.

Dr. Tencer also testified, based on his own work with bones and nerves, that nerves are much weaker than bones, *id.* at 19:18-20:1, 24:19-25:24; *see also* CP 2373, ¶2:10-14, and that, if the natural forces of labor could cause fractures of the clavicle, then that shows that the natural forces of labor are very high. 10/27 RP (Tencer) 20:11-19. Finally, he opined that it "certainly appears" that natural forces of labor can cause rupture or avulsion of the brachial plexus. *Id.* at 22:6-9. He was not asked about and did not offer any opinion as to the specific forces involved in L.M.'s labor and delivery or the cause of L.M.'s injury. *See id.* at 26:4-6.

D. The Jury's Verdict and Entry of Judgment

The jury returned a defense verdict on October 30, 2015, answering "No" to the first question: "Was Laura Hamilton negligent?" CP 3822-23. The trial court entered judgment on the verdict that same day,

CP 3824-25, and subsequently denied L.M.'s motion for new trial, CP 4750-51. L.M. timely appealed. *See* CP 4752-4817.

E. Procedural Background Relating to L.M.'s Attempts to Exclude the Natural Forces of Labor Theory of Causation.

1. L.M's motion to exclude expert testimony about natural forces of labor causation.

On August 19, 2015, just two months before trial, L.M. moved under ER 702, ER 403, and *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), to exclude any expert testimony concerning natural forces of labor causation and the medical articles on which it was based, claiming that, in the absence of medical literature specifically establishing that rupture or avulsion brachial plexus injuries like L.M.'s (as opposed to permanent brachial plexus injuries) can be caused by natural forces of labor, such testimony was speculative, unreliable, misleading, more prejudicial than probative, and not generally accepted in the relevant medical community. CP 1459-1599; *see also* CP 2045-2119. In support of his motion, L.M. relied upon two New York cases[13] that had rejected similar evidence, *see* CP 1475-78, and the declarations of Midwife Kelly, CP 1554-64, Dr. Glass, CP 1565-83, and Dr. Mandel, CP 1584-99, in which they opined that L.M.'s injury involving avulsion and rupture of all five brachial plexus nerve roots was more likely than not caused by excessive traction

[13] *Muhammed v. Fitzpatrick*, 91 A.D.3d 1353, 937 N.Y.S. 2d 519 (4th Dept. 2012); *Nobre ex rel Ferraro v. Shanahan*, 42 Misc. 3d 909, 976 N.Y.S.2d 841 (Sup. Ct. 2013).

applied by Midwife Hamilton at the time of his birth, that that is the only way his injury could have occurred, and that it is improbable, if not impossible, for it to have been caused by natural forces of labor, *see* CP 1557 at ¶9 (Kelly), 1573 at ¶9 (Glass), 1587-88 at ¶9 (Mandel) (disagreeing with the pinions of defense obstetrician expert Dr. Elizabeth Sanford), [14] 1590 at ¶14 (Mandel). Each of L.M.'s experts expressed their view that there were no medical studies or case reports stating that avulsion or rupture injuries to the brachial plexus can be caused by natural forces of labor. CP 1557 at ¶9:18-21 (Kelly), 1573 at ¶9:1-4 (Glass), 1573 at ¶9:8-10 (Glass), 1590 at ¶14:13-14 (Mandel); *see also* CP 1588 at ¶9: 3-5 (Mandel).

Midwife Hamilton opposed the motion on grounds that her experts' natural forces of labor causation opinions and associated literature did not implicate *Frye*, met the requirements of ER 702, were relevant to the issues, would be helpful to the jury, and were based on generally accepted scientific methodologies and techniques published in the medical literature over the last 25 years and affirmed by the 2014 ACOG Report on "Neonatal Brachial Plexus Palsy." CP 1736-60; *see* CP 1867-1987.

Midwife Hamilton supported her opposition with a declaration from Dr. DeMott, CP 1838-2041, who attached the pertinent articles from

[14] Dr. Sanford was the only defense expert L.M.'s counsel chose to depose. *See* CP 1777. L.M.'s counsel attached a declaration from her, CP 1525-27, and excerpts from her deposition, CP 1528-36, to his declaration in support of the motion to exclude, CP 1503-53.

the medical literature, *see* CP 1848-2041, and explained (as he also did at trial, *see* footnote 11, *supra*) how the scientific understanding of the etiology of brachial plexus injuries has evolved over the past 15 to 25 years, CP 1839-42 at ¶¶12-20; that the medical literature does describe permanent injury to the brachial plexus occurring as a result of maternal forces of labor, CP 1839 at ¶15, 1842 at ¶20, 1843-47 at ¶¶23-31; that claims that permanent brachial plexus injuries cannot be caused by maternal forces and are evidence of provider negligence are not supported by the peer-reviewed medical literature, CP 1842 at ¶19; that Dr. Mandel's focus on the lack of literature specific to permanent brachial plexus injuries presenting as rupture or avulsion misrepresents current science, as the literature focuses on the permanent nature of the injury and associated etiologies, not the subcategories of permanent injuries, CP 1842-43 at ¶22; and that there is no scientific data suggesting that the natural forces of labor alone cannot cause the subset of permanent brachial plexus injuries that involve rupture or avulsion, CP 1842-43 at ¶22; *see also* CP 1839 at ¶14. Dr. DeMott opined that L.M.'s permanent brachial plexus injury was more probably than not caused by maternal forces. CP 1848 at ¶34.

Midwife Hamilton also submitted additional excerpts of the deposition of Dr. Sanford, CP 1789-91, in which Dr. Sanford testified not only that, based on the medical literature, she could give an opinion as to

whether in-utero forces can cause a nerve avulsion injury, but also that, in her opinion, L.M.'s injury was not related to the delivery, but occurred from the forces of labor before his delivery, as she saw nothing unusual in the delivery process. CP 1791.

Following argument on September 18, 2015, *see* 9/18 RP 3-18, the trial court granted the motion, concluding, among other things, that (1) under ER 702, the evidence the defense proffered was not specific enough to establish that natural forces of labor can cause the specific type of injury (permanent avulsion injury) that L.M. had; (2) under *Frye*, the defense had not established that there was consensus in the scientific community that such an injury could be caused by natural forces of labor; and (3) the defense experts' testimony was insufficient to "specifically tie the injury here in this case to the natural forces of labor." 9/18 RP (Motion Hearing) 18-20. The trial court so ruled even though it recognized that the defense expert testimony was akin to a differential diagnosis such that, if (as the defense experts testified) no excessive traction was applied, then the only thing left that could have caused L.M.'s injury was the natural forces of labor, and even though it recognized that one could not "go yank on a baby's head" and test how much force is enough to cause an avulsion of an infant's brachial plexus. *Id.* at 19-20.

On September 25, 2015, the court entered its order granting the

motion. CP 2622-27. In discussing the form of the order, Midwife Hamilton's counsel advised the court and L.M.'s counsel that she would be bringing a motion for reconsideration.[15] 9/25 RP (Motion Hearing) 4.

2. L.M.'s motion for partial summary judgment on negligence and causation.

Meanwhile, on September 4, 2015, L.M. had filed a motion for partial summary judgment asking the court to rule as a matter of law that Midwife Hamilton was negligent and proximately caused L.M.'s injuries, based upon his claim that the declaration testimony of his experts – Dr. Mandel, Dr. Glass, and Midwife Kelly – that avulsion and rupture of all of the brachial plexus nerve roots could only occur as a result of excessive lateral or rotational traction manually applied to the head at the time of delivery was undisputed. CP 1621-36. In her response filed contemporaneously with her motion for reconsideration of the order excluding natural forces of labor causation evidence, Midwife Hamilton presented declaration testimony from her experts – Dr. Sanford (CP 2662-66), Dr. DeMott (CP 2667-72), and Midwives Browder (CP 2658-61) and Beth Coyote (CP 2651-57) – that Midwife Hamilton complied with the standard of care, that the video of L.M.'s birth showed no evidence of pulling or excessive

[15] In her 9/24/15 reply in support of her motion *in limine* that she be allowed to offer evidence of other possible causes of L.M.'s injury, Midwife Hamilton also informed the court and counsel that she would be filing a motion for reconsideration of the trial court's ruling excluding evidence concerning natural forces of labor causation. *See* CP 2329.

traction by Midwife Hamilton, and that, therefore, the most likely cause of L.M.'s injury more probably than not was natural forces of labor.

Midwife Hamilton also pointed out declaration testimony from her pediatric neurologist expert, Dr. Collins, that maternal forces of labor can cause avulsion and rupture to the brachial plexus without negligence by the birth attendant, CP 2673-80, and from her biomechanical engineering expert, Allan Tencer, Ph.D., that it takes greater force to fracture a clavicle than to rupture or avulse the brachial plexus, CP 2681-2870, as well as testimony from L.M.'s expert Dr. Mandel that he has had four deliveries with spontaneous clavicle fractures, including one where his hands were nowhere near the patient, CP 2883-84. *See* CP 2637-39.

3. Midwife Hamilton's Motion for Reconsideration.

Contemporaneously with her opposition to L.M.'s motion for partial summary judgment, Midwife Hamilton, on October 1, 2015, filed her motion for reconsideration, CP 2920-3095, supported by a supplemental declaration from Dr. DeMott, CP 2667-72, and declarations from Drs. Sanford, CP 2662-66, Collins, CP 2673-80, and Tencer, CP 2681-2870, and Midwives Browder, CP 2658-61 and Coyote, CP 2651-57. She pointed out that her experts were indisputably qualified; that their testimony was not novel scientific evidence; that the methodologies they employed to reach their causation opinions were the same methodologies

L.M.'s experts employed and were generally accepted in the medical community; that *Frye* requires only that the experts' methodology, not the specific conclusions drawn from the use of that methodology, be generally accepted; that a majority of courts in other jurisdictions have found testimony on the natural forces of labor admissible; that, under applicable law, the defense may present evidence of other possible causes of plaintiff's injury; and that the defense experts' testimony would assist the jury in understanding the birth process, the natural forces involved, and the complexities of the two competing causation theories – excessive traction (which according to the defense experts' review of the birth video, did not occur) or natural forces of labor.

L.M. opposed the motion, arguing that none of the CR 59(a) grounds for reconsideration were met, and reiterating the positions he took in his earlier motion to exclude the evidence. *See* CP 3212-29.

4. Midwife Hamilton's motion to allow Ph.D Tencer's biomechanical expert testimony as to endogenous and exogenous forces of labor.

Meanwhile, on September 25, 2015, in response to the trial court's September 18, 2015 request that the defense produce information as to Dr. Tencer's anticipated testimony so that it could determine its admissibility, *see* 9/18 RP (Motion Hearing) 26:2-12; CP 2358, Midwife Hamilton filed a Motion to Allow the Testimony of Allan Tencer, Ph.D, a biomechanical

engineer, as to the endogenous and exogenous forces involved in the birth process and whether they could cause brachial plexus injury. CP 2358-2608; *see also* CP 3231-38. In that motion, Midwife Hamilton made clear that Dr. Tencer would not be offering any "medical" opinions. CP 2360. And, as Dr. Tencer stated in his declaration, CP 2372-2554, "[f]rom a biomechanical forces perspective, it is not possible to differentiate whether the brachial plexus injury suffered by [L.M.] resulted from exogenous, endogenous or some combination of both forces." CP 2376, ¶5(i).

L.M. opposed the motion, claiming that Dr. Tencer's opinion testimony went to the heart of the natural forces of labor causation defense that the court had excluded and was speculative and misleading, and expressing his counsel's disagreement with conclusions Dr. Tencer drew from the biomechanical studies on brachial plexus injuries in infants upon which he relied. CP 3175-3204.

5. The Court's Rulings on Midwife Hamilton's Motions for Reconsideration and to Allow Dr. Tencer's Testimony, and L.M.'s Motion for Partial Summary Judgment.

On October 12, 2015, after carefully reviewing the parties' submissions and hearing argument on Midwife Hamilton's motion for reconsideration, 10/12 RP 6-26, the trial court granted the motion to reconsider and changed his ruling so as to allow the defense to present evidence regarding the natural forces of labor. *Id.* at 26-30; CP 3246-48.

The trial court candidly acknowledged that, when it previously ruled that there was no evidence specifically dealing with natural forces of labor causing avulsion of the brachial plexus, he had gotten it wrong, as experts' ultimate opinions are not what must be generally accepted, just the methodology on which the opinions are based. 10/12 RP (Motion Hearing) 26. The trial court felt that it would be substantially unfair to limit the defense to testimony that Midwife Hamilton did not violate the standard of care or apply traction, but then leave the defense unable to explain how the injury could have happened in the absence of traction. *Id.* at 27.

The court reasoned that the issue was one of weight, not admissibility, and that the peer-reviewed and published literature, including the ACOG report, favored admissibility. *Id.* Recognizing that the parties were coming at the issue from different directions, with the defense focusing on permanent versus transient injuries, and the plaintiff focusing on stretching, neuromas, ruptures and avulsions, the court was satisfied that, while the ACOG report does not speak specifically about avulsions, it does speak about permanent injuries, which means some disruption of the nerve, and that is enough for the evidence to go to the jury. *Id.* at 27-28.

The court was persuaded by the logic of cases from other jurisdictions that favor admissibility, and in particular the court's treatment in *Taber v. Roush*, 316 S.W.3d 139 (Tex. App.-Houston [14th. Dist.] 2010),

of why the use of retrospective rather than prospective studies was excused by ethical considerations – one could not ethically go in and determine how much pressure it takes to actually cause a rupture or avulsion – and why, in the absence of such testing it is appropriate to look at peer-reviewed and published literature. 10/12 RP (Motion Hearing) 28-29. The court indicated that it no longer believed that the conclusion the defense experts reached was a novel one, but was based on reliable principles and methods and that, even though there is no medical literature specifically attributing permanent avulsion injuries to natural forces of labor, there is also no literature that specifically stating that such injuries can occur only from use of excessive lateral traction. *Id.* at 29-30.

The trial court also granted Midwife Hamilton's motion to allow Dr. Tencer's testimony. *Id.* at 37-38; CP 3244-45. Although it had previously excluded Dr. Tencer's testimony in an automobile accident case, the court found he was qualified to testify in this case and that his testimony would be helpful to the jury to understand the forces at play. 10/12 RP (Motion Hearing) at 37. The court accepted defense counsel's statement that Dr. Tencer would not be testifying about causation and indicated that, if Dr. Tencer crossed the line, it would expect an immediate objection that it would sustain. *Id.* at 37-38.

Finally, on L.M.'s motion for partial summary judgment on negli-

gence and causation, L.M's counsel acknowledged that, with the grant of the motion for reconsideration to allow the natural forces of labor testimony, he could not see how the court could grant summary judgment. *Id.* at 38-39. Thus, the court denied the motion. *Id.*; CP 3241-43.

IV. ARGUMENT

A. The Trial Court Properly Admitted Expert Testimony Concerning Natural Forces of Labor Causation of Brachial Plexus Injuries.

1. Standard of Review.

"Generally, expert testimony is admissible if (1) the expert is qualified, (2) the expert relies on generally accepted theories in the scientific community, and (3) the testimony would be helpful to the trier of fact." *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 352, 333 P.3d 388 (2014). A trial court has "wide discretion in ruling on admissibility of expert testimony" and the appellate court "will not disturb the trial court's ruling if the reasons for the admitting or excluding the opinion evidence are both fairly debatable."[16] *Miller v. Likins*, 109 Wn. App. 140, 147, 34 P.3d 835 (2001) (citation omitted). The abuse of discretion standard of review applies to a trial court's determination as to whether a witness is qualified and whether the expert's testimony would be helpful to the jury under ER 702. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d

[16] A trial court abuses its discretion when its discretion is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

909, 919, 296 P.3d 860 (2013); *Ma'ele v. Arrington*, 111 Wn. App. 557, 563, 45 P.3d 557 (2002); *see also Colwell v. Holy Family Hosp.*, 104 Wn. App. 606, 611-12, 15 P.3d 210, *rev. denied*, 144 Wn.2d 1016 (2001).

A trial court's decision to admit or exclude novel scientific evidence under *Frye* based upon general acceptance in the relevant scientific community, however, is reviewed de novo. *Lakey*, 176 Wn.2d at 919; *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 600, 260 P.3d 857 (2011). Although law articles and decisions of other jurisdictions may be considered, "[t]he relevant inquiry, however, is general acceptance by scientists, not by courts or legal commentators." *State v. Jones*, 130 Wn.2d 302, 307, 922 P.2d 806 (1996).

2. The trial court did not err in its *Frye* analysis, nor was *Frye* even implicated.

L.M. asserts, *App. Br. at 1, 9, 11, 12-22*, that the trial court did not conduct a proper *Frye* analysis and erred in allowing the defense medical experts to testify to their opinions that natural forces of labor caused his injury, claiming that it is not generally accepted in the medical community that avulsion of brachial plexus nerves can be caused by natural forces of labor. But, L.M. ignores the fact that "[t]he *Frye* test is implicated only where the opinion offered is based upon novel scientific evidence." *Anderson*, 172 Wn.2d at 611 (citing *Reese v. Stroh*, 128 Wn.2d 300, 306,

907 P.2d 282 (1995)). He further ignores that the Washington Supreme Court "has consistently found that if the science and methods are widely accepted in the relevant scientific community, the evidence is admissible under *Frye*, without separately requiring widespread acceptance of the [party's] theory of causation." *Anderson*, 172 Wn.2d at 609 (citations omitted).

Thus, *Frye* applies "where either the theory and technique or the method of arriving at the data relied upon is so novel that it is not generally accepted by the relevant scientific community." *Id.* at 611. "*Frye* does not require that the specific conclusions drawn from the scientific data … be generally accepted in the scientific community." *Id.* "[T]he application of accepted techniques to reach novel conclusions does not raise *Frye* concerns." *Lakey*, 176 Wn. 2d at 919.

Here, there was nothing novel about the scientific methodology the defense medical experts used to arrive at their causation opinions. They, like L.M.'s experts, relied upon their review of L.M.'s medical records and his birth video, their interpretation of the applicable medical literature, and their knowledge, skill, training, and experience. As that was the methodology L.M.'s medical experts employed, it can hardly be said that the defense medical experts' use of the same methodology suddenly became novel. That L.M.'s medical experts drew different conclusions

from the same medical records and birth video and the same peer-reviewed medical literature does not make either side's medical experts' conclusions novel or less worthy of the jury's consideration.

Moreover, as the trial court at one point correctly noted, the testimony presented was akin to a differential diagnosis. *See* 9/18 RP (Motion Hearing) 19:3-8. Differential diagnoses are something medical experts traditionally employ to reach opinions about the cause of medical conditions. *Anderson*, 172 Wn.2d at 610 ("Many medical opinions on causation are also based upon differential diagnoses. A physician or other qualified expert may base a conclusion about causation through a process of ruling out potential causes with due consideration to temporal factors, such as events and the onset of symptoms."). Here, L.M.'s medical experts believed the video showed a shoulder dystocia and Midwife Hamilton exerting excessive traction to reduce it, and thus opined that such excessive traction must have caused L.M.'s injury. But, the defense medical experts did not believe the video showed a shoulder dystocia or use of excessive force by Midwife Hamilton, and thus, in the absence of such excessive force, concluded that L.M.'s injury was more likely than not caused by natural forces of labor. There is nothing novel about the methodology the experts used to reach their conclusions.

L.M.'s repeated insistence, *App. Br. at 12- 22*, that there is no

medical literature specifically stating that brachial plexus avulsion injuries can be caused by natural forces of labor is beside the point.[17] The *Frye* consideration is whether the methodology the experts used to arrive at their conclusion, not whether the conclusion they drew, is generally accepted in the relevant scientific community. Moreover, L.M. ignores the fact that there is no medical literature, as his own experts conceded, establishing that avulsions of the brachial plexus nerves ***cannot*** be caused by the forces of labor. As Dr. Glass put it on the issue of whether natural forces of labor can produce the force needed to cause multiple nerve avulsions and ruptures like L.M. had, "[w]e simply lack the data to say that it can or it can't ... [e]ither way." 10/22 RP (Glass) 120:10-15. *Frye* does not "require the exacting level of scientific certainty to support opinions on causation" – if it did, it would "change the standard for opinion testimony in civil cases." *Anderson*, 172 Wn.2d at 608 (citation omitted).

Here, Midwife Hamilton presented more than ample expert testimony and evidence from peer-reviewed medical literature that shows general acceptance in the medical community that natural forces of labor

[17] L.M. claims that Dr. Sanford testified that the medical literature does not support the opinion that the [natural forces of labor] can cause an avulsion injury. She did not so testify. To the contrary, she testified, not only that she could give an opinion, based on the medical literature, as to whether in-utero forces can cause a nerve [avulsion] injury, but also that, in her opinion, that L.M.'s injury more probably than not was not related to the delivery, but occurred from the forces of labor before his delivery, as she saw nothing unusual in the delivery process. CP 1791.

can cause permanent (or persistent) brachial plexus injuries. *See, e.g.*, CP 1639-47, 1852-2041.[18] As L.M.'s own obstetrical expert, Dr. Mandel, conceded, the references in the 2014 ACOG Report to permanent (or persistent) injuries include avulsions, ruptures, and severe stretch injuries. 10/21 RP (Mandel) 117:7-21, 118:7-11; *see also* CP 1839 at ¶12, 2670 at ¶9. As Dr. Collins testified, the fact that the nerve injury is permanent or persistent means that the nerve has ruptured or avulsed. CP __ (Collins Dep. at 29:14-30:7). And, as Dr. DeMott made clear, brachial plexus injuries are all stretch injuries and to date, no one has ever demonstrated that it takes more force to cause a rupture or avulsion than it takes to cause an intact stretch injury, nor have any studies been done to compare the forces during delivery with the specific subcategories of permanent brachial plexus injuries.[19] 10/28 RP (DeMott) 27:18-28, 94:12-95:1; CP 1842, ¶22. When one considers that only a small percentage of brachial plexus injuries are permanent, and that only in those infants who have undergone detailed radiological studies or surgery is there data on the

[18] The 2014 ACOG Report on "Neonatal Brachial Plexus Palsy," which analyzed the research that has been completed over the past 10-25 years that establishes that permanent brachial plexus injuries can be caused by natural forces of labor has been endorsed not only by ACOG, but also by the American College of Nurse Midwives, The Child Neurology Society, The March of Dimes Foundation, The Royal College of Obstetricians and Gynecologists, The American Academy of Pediatrics, The American Gynecological and Obstetrical Society and the Society for Maternal-Fetal Medicine. CP 2668, ¶4.

[19] Nor, as the trial court properly noted, 10/12 RP (Motion Hearing) 29: 1-7, 22-23, could such studies ethically be done.

specific type of permanent injury sustained, it is understandable that the current medical literature has not specifically subdivided permanent brachial plexus injuries into avulsions and rupture as opposed to intact stretches. *See* 10/28 RP (DeMott) 67:22-68:23, CP 1848 at ¶33..

This case is analogous to *Anderson*, 176 Wn.2d at 610-12, where the court held that it was not necessary under *Frye* for the plaintiff to show that the specific causal connection between a specific toxic organic solvent and the specific birth defect sustained was generally accepted, but that it sufficed that the plaintiff could show that there was nothing novel about the theory that organic solvent exposure may cause brain damage and encephalopathy. Here, too, it was not necessary under *Frye* for the defense to show that it was generally accepted that the specific avulsion or rupture injury L.M. sustained can be caused by natural forces of labor. And, just as there was nothing novel about the theory in *Anderson*, 176 Wn.2d at 611, that organic solvent exposure may cause brain damage and encephalopathy, there was nothing novel about the theory here that maternal forces of labor may cause permanent brachial plexus injuries. "Frye does not require every deduction drawn from generally accepted theories to be generally accepted." *Anderson*, 176 Wn.2d at 612. If "general acceptance of each discrete and ever more specific part of an expert opinion" were required, then "virtually all opinions based upon

scientific data could be argued to be within some part of the scientific twilight zone." *Anderson*, 176 Wn.2d at 611.

L.M. suggests, *App. Br. at 13-14, 29*, that because courts in two New York cases – *Nobre ex rel. Ferraro v. Shanahan*, 42 Misc. 3d 909, 976 N.Y.S.2d 841 (Sup. Ct. 2013); *Muhammed v. Fitzpatrick*, 91 A.D.3d 1353, 937 N.Y.S. 2d 519 (4th Dept. 2012) – excluded the natural forces of labor evidence, the trial court erred in admitting it here. L.M., however, ignores that the majority of courts in other jurisdictions – both *Frye* and *Daubert* jurisdictions – have found testimony on natural forces of labor admissible.[20] And, L.M. ignores the inconsistency in the *Nobre* and *Muhammed* courts' rationales, as well as those decisions' inconsistency with other New York decisions.[21] While the *Muhammed* court concluded that the natural forces of labor theory did not pass muster under *Frye*, the *Nobre* court disagreed and held that it satisfied the requirements of *Frye*.

Here, when considering the cases from other jurisdictions on Midwife Hamilton's motion for reconsideration, the trial court found per-

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[20] For *Frye* jurisdictions, *see Ruffin ex rel. Sanders v. Boler*, 384 Ill. App. 3d 7, 9 (2008); *Stapleton ex rel. Clark v. Moore*, 403 Ill. App. 3d 147, 166 (2010); *Landau v. Rappaport*, 306 A.D.2d 446, 446-47, 761 N.Y.S.2d 325 (2nd Dept. 2003); *Munoz v. Rubino*, 37 Misc. 3d 1216(A), 961 N.Y.S.2d 359 (Sup. Ct. 2012); and *Kawache v. United States*, 471 F. App'x. 10, 12-14 (2d. Cir. 2012). For *Daubert* jurisdictions, *see, e.g., Taber v. Roush*, 316 S.W.3d at 144; *Estate of Ford v. Eicher*, 250 P.3d 262, 264 (Colo. 2011); *Luster v. Brinkman*, 205 P.3d 410, 415 (Colo. Ct.App. 2008); and *Clark by & through Clark v. Heidrick*, 150 F. 3d 912, 914 (8th Cir. 1998).

[21] *See Landau v. Rappaport*, 306 A.D.2d 446, 446-47 (N.Y. 2003); *Munoz v. Rubino*, 37 Misc. 3d 1216(a), 961 N.Y.S.2d 359 (Sup. Ct. 2012); and *Kawache v. United States*, 471 F. App'x. at 12-14, all allowing natural forces of labor testimony.

suasive the court's decision in *Taber v. Roush*, 316 S.W. 139 (Tex. App.-Houston [14th Dist.] 2010), a case involving a child who sustained an avulsion injury to the brachial plexus during birth. The *Taber* court affirmed the trial court's admission of testimony that the injury could have been caused by natural forces of labor because: (1) the use of retrospective, rather than prospective, studies was excused by ethical considerations; (2) the experts' reliance on peer-reviewed literature was sufficient to "bridge the analytical gap" between the natural forces theory and the child's injury; and (3) even if the testimony arrived at a novel scientific conclusion, it was based on reliable principles and methodology. *Id.* at 152-56.

L.M. nonetheless suggests, *App. Br. at 22*, that the defense medical experts "had only their alleged knowledge and experience to rely upon" to conclude that an injury like L.M.'s could occur from natural forces of labor alone. Even if that were true, which it is not, L.M. cites no authority that experts may not rely solely upon their knowledge and experience as the bases for their causation opinions. As the court in *Anderson*, 172 Wn.2d at 610, explained: "Many expert medical opinions are pure opinions and are based on experience and training rather than scientific data." Indeed, *Frye* is inapplicable where the expert testimony is based not on novel methods of proof or novel scientific principles from which conclusions are drawn, but on practical experience and acquired knowledge.

State v. Ortiz, 119 Wn.2d 294, 311, 831 P.3d 1060 (1992), *overruled on other grounds by State v. Condon*, 182 Wn.2d 307, 323 (2015).

Contrary to L.M.'s assertions, the trial court did not err in its *Frye* analysis or its conclusion that the defense medical experts' causation opinions were based on a generally accepted scientific methodology.

3. The trial court properly exercised its discretion in determining that expert testimony concerning natural forces of labor causation was admissible under ER 702.

As the court explained in *Anderson*, 172 Wn.2d at 603, once *Frye* has been satisfied, "then application of the science to a particular case is a matter of weight and admissibility under ER 702," which provides that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

Admissibility under ER 702 is a two-step inquiry, "whether the witness qualifies as an expert and whether the expert testimony would be helpful to the trier of fact. *Reese*, 128 Wn.2d at 306. "Expert testimony is usually admitted under ER 702 if it will be helpful to the jury in understanding matters outside the competence of ordinary lay persons." *Anderson*, 172 Wn.2d at 600. In addition, "[e]xpert medical testimony must meet the standard of reasonable medical certainty or reasonable medical probability." *Id.* at 606-07.

Here, L.M. does not dispute that the defense medical experts, Drs. DeMott, Sanford, and Collins and midwives Browder and Coyote, were qualified by knowledge, skill, training, education, or experience to testify concerning causation and natural forces of labor. Nor can he seriously contend that the natural forces of labor and whether those forces can cause permanent brachial plexus injuries, including those due to avulsions and rupture, are within the competence of ordinary lay persons such that expert testimony was not needed or would not be helpful to the jury in understanding how this type of injury can be caused prior to birth. And he has never contended that the defense medical experts' opinions were not based on a reasonable degree of medical probability. The trial court properly admitted the evidence under ER 702.

That L.M., *App. Br. at 14-20*, quibbles with several of the articles the defense medical experts relied upon and the extent to which those articles support the defense position that avulsion injuries can occur due to natural forces of labor, his quibbling goes to the weight not the admissibility of the experts' opinion testimony. At most, it provided fodder for cross-examination of those experts. *See Anderson*, 172 Wn. 2d at 607 (noting that "evidence is tested by the adversarial process within the crucible of cross-examination, and adverse parties are permitted to present other challenging evidence"). And, L.M.'s claims, *App. Br. at 20-21*, that

the defense experts erroneously "extrapolated studies of symptoms, without regard to the actual injury" or "do not discuss whether the symptoms are the result of stretch, rupture or avulsion," not only is belied by Dr. Mandel's and other experts' testimony that the literature's references to permanent brachial plexus injuries includes ruptures and avulsions, but also goes to weight, not admissibility.

4. L.M. has failed to establish any prejudice from the trial court's admission of testimony concerning natural forces of labor causation.

L.M. asserts, *App. Br. at 21*, the trial court erred in admitting natural forces of labor causation testimony without conducting a *Frye* hearing. L.M., however, ignores that he never requested one.[22] Nor has he shown what, if anything, he would have been presented at a *Frye* hearing that he did not present in the voluminous materials submitted on the motion to exclude and motion for reconsideration, or how he was prejudiced by not having a *Frye* hearing that he did not even request. "[E]rror without prejudice is not grounds for reversal." *Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 688 P.2d 571 (1983).

L.M. claims, *App. Br. at 22*, that he was prejudiced because the trial court granted reconsideration one week before trial. But that claim of prejudice ignores that L.M. had long known about the defense's theory of

[22] Rather, he argued that the defense had not requested one. *See* CP 2045:19, 3213:9-10

causation and his experts had already testified about it in depositions and declarations, that L.M. did not move to exclude the evidence until two months before trial and did not obtain a favorable ruling on that motion until a month before trial, and that L.M. was apprised a week later that Midwife Hamilton planned to move to reconsider and filed that motion the following week. Under such circumstances, it can hardly be said that the ruling granting reconsideration one week before the trial caught L.M. unaware or left him unprepared to deal with the natural forces of labor theory at trial. If he thought it did, he should have moved for a trial continuance, something he did not do.

And, L.M. has not shown how the trial court's admission of forces of labor causation testimony prejudiced him, when the jury found no negligence and never reached the issue of proximate cause. *See, e.g., Hizey v. Carpenter*, 119 Wn. 2d 251, 269-70, 830 P.2d 646, 656 (1992) (any error in instructing jury on contributory negligence was harmless when jury did not reach the issue, having found the defendant not negligent).

B. The Trial Court Properly Exercised Its Discretion in Allowing Dr. Tencer to Testify Concerning the Biomechanical Forces Involved in Labor and Delivery, While Precluding Him from Testifying as to the Cause of L.M.'s Injury.

Without reference to Dr. Tencer's actual trial testimony, but focusing only on his declaration testimony, L.M. asserts, *App. Br. at 1, 9, 22-31,*

that the trial court erred in allowing Dr. Tencer to quantify the forces at play in labor and delivery. Contrary to L.M.'s assertions, Dr. Tencer's testimony met the threshold standards for admissibility of expert testimony and the trial court did not abuse its discretion in admitting it. And, again, L.M. has not shown how such testimony prejudiced him, given that the testimony went to causation, an issue the jury never reached..

As previously noted, admissibility of expert testimony under ER 702 is a two-step inquiry, "whether the witness qualifies as an expert and whether the expert testimony would be helpful to the trier of fact," *Reese*, 128 Wn.2d at 306, and the trial court has "wide discretion in ruling on the admissibility of expert testimony" *Miller*, 109 Wn. App. at 140. Here, the trial court did not abuse its discretion in finding both that Dr. Tencer was qualified as an expert to testify on the biomechanical forces involved in labor and delivery and that his testimony in that regard would be helpful to the trier of fact. 10/12 RP (Motion Hearing) 37:8-38:2.

Dr. Tencer is qualified to testify as an expert on biomechanical forces involved in labor and delivery by virtue of his knowledge, training, and experience, as well as his review of the available studies and literature concerning those forces. He holds a Ph.D in Mechanical Engineering, and worked for more than 27 years as a Full Professor of Orthopedics and Sports Medicine and Adjunct Professor of Mechanical Engineering at the

University of Washington, and before that for seven years as an Assistant Professor of Surgery at the University of Texas. He has done biomechanical research, including studying the strength of the spinal cord and nerve roots. CP 2372-73, ¶2; 10/27 RP (Tencer) 5:16-7:14. He also reviewed the published research of other biomechanical engineers who have specifically studied the forces at work in labor and delivery. 10/27 RP (Tencer) 9:17-20, 10:22-11:19. And, as most laypersons do not have an understanding of the forces at play, their potential magnitude, or the strength of bones and nerves, his testimony in that regard would be of educational value to the jury in understanding and evaluating the causation evidence.

L.M. nonetheless claims, *App. Br. at 24*, that, because Dr. Tencer had no specialized training in birth injuries, the mechanics of childbirth, or the methods of responding to shoulder dystocia, he was not qualified to testify concerning the biomechanical forces involved in labor and delivery. But, L.M. cites no authority that an expert must have personal experience or must have personally conducted the studies on which he relies and cannot base his opinions on published works done by others in his field. Indeed, an expert need not acquire his knowledge though personal experience, but may testify based on his training, experience, professional observations, and acquired knowledge. *E.g.*, *State v. Rodriquez*, 163 Wn. App. 215, 232, 259 P.3d 1145 (2011); *Reese*, 128 Wn.2d at 307-08.

L.M.'s claims, *App. Br. at 25*, that Dr. Tencer's testimony was essentially a medical opinion that he was not qualified to make are without merit. L.M. ignores defense counsel's representation and the trial court's ruling Dr. Tencer would not be testifying as to the cause of L.M.'s injury. And, L.M. ignores that, at trial, Dr. Tencer was not asked about and did not offer any opinion as to the specific forces involved in L.M.'s delivery or the cause of L.M.'s injury. *See* 10/27 RP (Tencer) 26:4-6. In fact, as he testified in his declaration, from a biomechanical forces perspective, it was not possible to differentiate whether L.M.'s injury resulted from exogenous, endogenous or some combination of both forces. CP 2378, ¶5(i).

L.M.'s claims, *App. Br. at 25-26*, that Dr. Tencer somehow used an unreliable methodology for calculating the natural forces of labor ignores the fact that he relied upon published biomechanical studies done by other biomechanical engineers, *see* CP 2373-76, and that those very studies have also been relied upon and cited in peer-reviewed medical literature concerning the cause of brachial plexus injuries in newborns like the 2014 ACOG Report, that has been endorsed by numerous medical professional societies. *See* CP 2373-74 at ¶4; *see also* footnote 18, *supra*.

L.M.'s attempts, *App. Br. at 26-30*, to impugn Dr. Tencer's integrity and to claim that Dr. Tencer's conclusions lack reliability are also without merit. First, L.M. focuses on Dr. Tencer's declaration testimony

and not his actual trial testimony. Second, although L.M. presents his counsel's disagreement with Dr. Tencer's declaration testimony and interpretation of what the various studies mean, L.M.'s counsel's attacks on Dr. Tencer's testimony do not impact its admissibility because "the thoroughness of an expert's examination of the real evidence is a matter of weight for the jury." *Tokarz v. Ford Motor Co.*, 8 Wn. App. 645, 653, 508 P.2d 1370 (1973). The trial court did not abuse its discretion when, confronted with the same arguments L.M. makes on appeal, reasoned that the arguments might make "excellent arguments for cross-examination." 10/12 RP (Motion Hearing) 37:21-22.

Finally, L.M. suggests, *App. Br. at 31*, that because Dr. Tencer made no attempt to calculate the forces acting on L.M.'s body or the force applied by Midwife Hamilton, his testimony was rendered inadmissible. But, "an expert's testimony not based on a personal evaluation of the subject goes to the testimony's weight, not its admissibility. *Johnston-Forbes*, 181 Wn.2d at 357. Dr. Tencer was not called to testify about the actual forces involved in L.M.'s labor and delivery. He was only asked to describe the endogenous and exogenous forces generally at play in labor and delivery. Because Dr. Tencer was qualified to give such testimony and it would be helpful to the jury in understanding those forces, the trial court did not abuse its discretion in allowing Dr. Tencer to testify.

C. The Trial Court Properly Exercised Its Discretion in Granting Midwife Hamilton's Motion for Change of Venue Once L.M.s Claims against the JUA and MSS Were Dismissed.

Appellate courts review venue decisions for abuse of discretion. *Unger v. Cauchon*, 118 Wn. App. 165, 170, 73 P.3d 1005 (2003). If a party objects to a venue decision,

> [the] proper remedy [is] to seek [discretionary review] and not to wait until the trial [is] concluded and then ask an appellate court to set aside an unfavorable judgment on the basis that the venue was laid in the wrong county. If the latter course if followed, it is incumbent upon an appellant to show that he was prejudiced by the denial of a change of venue; otherwise a new trial will not be granted.

Lincoln v. Transamerica Inv. Corp., 89 Wn. 2d 571, 578, 573 P.2d 1316 (1978). *Accord*, *Youker v. Douglas County*, 162 Wn. App. 448, 460, 258 P.3d 60 (2011).

Here, L.M. did not seek discretionary review of the decision to transfer venue to Lewis County once the claims against the JUA and MSS were dismissed. Instead, he waited to ask this Court to overturn that venue decision after he obtained an unfavorable judgment in Lewis County Superior Court. Under such circumstances, even an erroneous venue decision will not be overturned absent a showing of prejudice.

L.M. has not shown, nor can he show, prejudice from the change of venue decision and thus it does not afford grounds for a new trial. Indeed, as the court noted in *Youker*, 162 Wn. App. at 460 (quoting

Lincoln, 89 Wn.2d at 578, and *Russell v. Marenakos Logging Co.*, 61 Wn. 2d 761, 765, 380 P.2d 744 (1963)), a party "tend[s] to have difficulty demonstrating prejudice [in such cases] because 'except in rare instances, the mills of justice grind with equal fineness in every county in the state.'"

This is not a case like *State v. Hillman*, 42 Wash. 615, 85 P. 63 (1906), where a new trial was granted on venue grounds because adverse publicity prejudiced the defendant. Nor is L.M.'s unsubstantiated assertion, *App. Br. at 32*, that, because Midwife Hamilton has delivered over 3,000 babies, mostly within Lewis County, "[e]mpaneling a jury of 12 people who have had no contact with [her] was impossible" sufficient to establish prejudice from the transfer of venue to Lewis County. Indeed, the clerk's minutes reveal that, each time a party challenged a juror for cause, the juror was excused. *See* CP 4819-20.

In any event, Judge Schubert did not abuse his discretion in transferring venue to Lewis County. Under RCW 4.12.030(3), "[t]he court may, on motion, … change the place of trial when it appears by affidavit, or other satisfactory proof … [t]hat the convenience of the witnesses or the ends of justice would be forwarded by the change …." Here, once the JUA and MSS were dismissed as defendants, the court properly determined that the only remaining defendant, Midwife Hamilton, resided and practiced in Lewis County, the plaintiff, L.M., was born and resided in

Lewis County, and that the events related to the lawsuit all occurred in Lewis County, CP 6, such that the convenience of the witnesses and the ends of justice would be served by transferring the case to Lewis County.

Judge Schubert was not bound to accept L.M.'s assertions, CP 19-20, concerning the multitude of providers who treated him at Seattle Children's, most of whom it was highly unlikely L.M. would attempt to call, and whom L.M. did not call, at trial. Nor, contrary to L.M.'s claims, was Judge Schubert bound to consider the convenience of nonresident witnesses, such as the plaintiff's out-of-state experts. *See State ex rel. Nash v. Superior Court*, 82 Wash. 614, 617, 144 P. 898 (1914). Nor, contrary to L.M.'s suggestion, is the convenience or residence of counsel a consideration listed under RCW 4.12.030(3).

Ultimately, L.M's claim that it was an abuse of discretion to grant Midwife Hamilton's motion to change venue is belied by arguments L.M. made in response to the motion to the effect that "[i]f Hamilton is open to venue in King County, the motion to change [venue] to Lewis County should be denied," CP 21:6-7, that "[u]nder RCW 4.12.025, Hamilton can call for this action to be tried in the county of her residence," CP 21:9-10, and that if Midwife Hamilton was objecting to venue in King County, 'the case must be transferred to a court with proper venue." CP 21:13-14.

D. The Trial Court Properly Exercised Its Discretion in Excluding Dr. Tse from Testifying as to Causation.

Without citation to any authority, without regard to the limitations Dr. Tse himself placed on his ability to testify concerning the cause of L.M.'s brachial plexus injury, without regard to the totality of the trial court's reasons for its ruling, and without any showing of prejudice, L.M. claims that the trial court abused its discretion when it did not allow L.M.'s plastic surgeon, Dr. Tse, to testify to causation. Contrary to L.M.'s assertions, there was no abuse of discretion.

Before L.M.'s counsel presented excerpts of Dr. Tse's deposition to the jury, defense counsel objected to inclusion of the following excerpt from page 72, line 23 to page 73, line 11 of the deposition:

> Q. Doctor, in the big picture with regard to brachial plexus injuries and typically – and forget about Levi here – what causes them?
>
> Q. You mentioned traction and compression and what causes –
>
> A. Right. The most common cause of brachial plexus injury is traction in adults. In kids it's thought that it's kind of traction injury as well to the nerves.
>
> Q. And traction means something to – can you tell what you mean by traction?
>
> A. Traction just means pulling, so there's pulling on the nerves causes the injury.

10/21 RP (Tse Argument) 4-5; CP 4937-38 at 72:23-73:11. The bases for defense counsel's objection were that Dr. Tse, a plastic surgeon, not an obstetrician, was not qualified to testify to that opinion, his testimony

about traction would be cumulative, 10/21 RP (Tse Argument) 6-7, and he had earlier testified that he was not planning to testify as an expert in the case, 10/21 RP (Tse Argument) 5; CP 4926 at 61:16-18, admitted that he had not researched the literature on the cause of brachial plexus injuries in newborns, that his focus was "not so much on how this happened but how to take care of the babies," 10/21 RP (Tse Argument) 5; CP 4887 at 22:10-23:1, that he had not looked at the obstetrical literature to see what studies had been done to figure out how brachial plexus injuries occurred, 10/21 RP (Tse Argument) 5; CP 4950 at 85:4-8,[23] and that, with regard to his surgical finding in L.M.'s case of a "traumatic neuroma, he could not say how it occurred, "but it ***could be*** from traction," 10/21 RP (Tse Argument) 4; CP 4937 at 72:21-22 (emphasis added).[24]

After argument and review of portions of the deposition, the trial court ruled that it would not allow the challenged deposition excerpt to be presented because of "the qualifications" that Dr. Tse put on his testimony

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[23] Notwithstanding Dr. Tse's unequivocal admissions that he had not researched the literature on the cause of brachial plexus in injuries in newborns and had not looked at the literature from the obstetrical side to see what studies had been done to figure out these injuries occurred, L.M. asserts without citation to the record, *App. Br. at 22*, that "Dr. Tse stated that he has reviewed articles on the subject."

[24] He also testified that, not having more than a second-hand history of L.M.'s birth, he would not be able to opine on a more probable than not basis as to the cause of L.M.'s brachial plexus injury. CP 4926-27 at 61:23-62:3). Nonetheless, again without citation to the record, L.M. asserts in absolutist terms, *App. Br. at 33*, that Dr. Tse "opines that traction is ***the*** cause of brachial plexus injuries in children." [Emphasis added.] Even the excluded excerpt from Dr. Tse's deposition notes that he had previously mentioned both "traction and compression." CP 4938 at 73:2-3).

about the cause of brachial plexus injuries, because Dr. Tse had not "studied that," and because L.M. had "plenty of other witnesses who were going to be able to talk about that issue." 10/21 RP (Tse Argument) 8.[25]

The trial court did not abuse its discretion. A trial court has "wide discretion in ruling on the admission or exclusion of expert testimony" and the appellate court "will not disturb the trial court's ruling if the reasons for the admitting or excluding the opinion evidence are both fairly debatable." *Miller*, 109 Wn. App. at 140 (citation omitted).

Here, the trial court properly considered the limitations Dr. Tse himself placed on his ability to express an opinion as to the cause of brachial plexus injuries in newborns. He conceded that he had not studied the literature on the causation issue, and that he could not say how L.M.'s injury occurred other than to say it "could be" from traction. Moreover, that traction could be a cause of brachial plexus injury was not really in dispute, *see* 10/28 RP [DeMott] 65:4-22, 66:21-67:2, and, as set forth at *App. Br. at 5-7*, L.M. presented ample expert testimony from Dr. Mandel, Dr. Glass, and Midwife Kelly that it can be a cause.

A trial court does not abuse its discretion in excluding expert testimony that is speculative and lacking adequate foundation or that is

[25] Contrary to L.M.'s assertions, *App. Br. at 33*, the trial court did not exclude the deposition excerpt simply because it would be cumulative of the anticipated testimony of Dr. Glass, L.M.'s pediatric neurologist expert.

cumulative. *See, e.g.*, *Miller*, 109 Wn. App. at 148 ("conclusory or speculative expert opinions lacking an adequate foundation will not be admitted") (citation omitted); *Miller v. Peterson*, 42 Wn. App. 822, 827, 714 P.2d 695 (1986) ("[a] trial judge may exclude relevant evidence on the basis that it is cumulative. ER 403."). And, even an erroneous evidentiary ruling is not grounds for reversal unless the error was prejudicial. *Miller v. Kenny*, 180 Wn. App. 772, 794, 325 P.3d 278 (2014). "Exclusion of evidence is not prejudicial where the evidence is merely cumulative." *Tumelson v. Todhunter*, 105 Wn.2d 596, 603, 716 P.2d 890 (1986).

V. CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's judgment on the jury verdict in favor of Midwife Hamilton.

RESPECTFULLY SUBMITTED this 22nd day of July, 2016.

FAIN ANDERSON VANDERHOEF,
ROSENDAHL O'HALLORAN SPILLANE,
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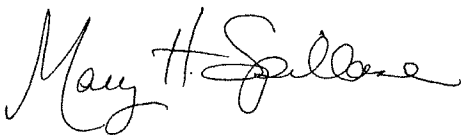
By 

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 22nd day of July, 2016, I caused a true and correct copy of the foregoing document, "Brief of Respondents Hamilton," to be delivered in the manner indicated below to the following counsel of record:

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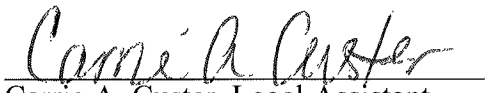

Carrie A. Custer, Legal Assistant

FAIN ANDERSON, ET AL.

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